IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 836 of 1980

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MONGHIBA LAKHAJI

Versus

HIRA KUNVAR MULJI

Appearance:

1. Civil Revision Application No. 836 of 1980

MR SURESH M SHAH for Petitioner

MR DEEPAK M SHAH for Respondent No. 1 [Decd.]

RULE SERVED for Respondent No. 1/1-1/2

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 09/05/2005

ORAL JUDGEMENT

This Revision Application has been preferred

against the judgment and order dated 29th January, 1980 passed by the learned Assistant Judge, Jamnagar in Regular Civil Appeal No.32 of 1977 under Section 29 (2) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 [hereinafter referred to as, "the Rent Act"].

The petitioner before this Court is the defendant-Appellant. The respondent-plaintiff instituted Regular Civil Suit No. 235 of 1973 in the Court of Civil Judge [SD], Jamnagar. The plaintiff claimed that she was the owner of the suit premises comprising one room, Osri and Verandah [Padthar], being part of the building bearing Survey No. 449-H-4, situated at Jamnagar. That the suit premises was leased to the defendant for monthly rent of Rs.12/=. However, subsequently, certain repairs and improvements were made and the monthly rent was raised to Rs.16/=. In a previous suit being Regular Civil Suit No. 492 of 1968 instituted for recovery of possession of the suit premises and the arrears of rent, municipal tax, education cess, etc., the parties had entered into compromise. Under the said compromise, the standard rent was fixed at Rs.16/= per month including municipal tax and education cess. The defendant was in arrears of rent since 1st June, 1971 to 28th February, 1973. The plaintiff had on 7th March, 1973 given suit notice [Exh.23] as envisaged by section 12 (2) of the Rent Act. The said notice was returned to the plaintiff with a postal endorsement of refusal to accept by the defendant on 10th March, 1973. Therefore, the suit, inter alia, for recovery of possession and a sum of Rs.336/= being the amount of arrears of rent.

The suit was contested by the defendant by filing written statement [Exh.8]. She denied the allegations made in the plaint. She also raised dispute as regards the standard rent. The defendant denied that she had received the suit notice or that she had refused to accept the suit notice.

The learned trial Judge under his judgment and order dated 18th February, 1977 held that the suit notice was duly served upon the defendant and that the defendant had refused to accept the same. The learned trial Judge was pleased to hold that there was a valid service of the suit notice upon the defendant. He further held that within one month from the date of service of the suit notice, the defendant had not raised dispute as regards the standard rent either by replying to the suit notice or by making application to the Court as envisaged under section 11 (2) of the Rent Act or in any other manner.

That the defendant was in arrears of rent since June, 1971 and that she was not ready and willing to pay the rent. The defendant had made attempt to tender the rent by sending a Money Order for Rs.300/= on 5th May, 1973 i.e., more than a month after the date of service of the notice. The amount sent by M.O was less than the amount of arrears of rent due. The Court, therefore, held that the defendant was not entitled to protection under section 12 (1) of the Rent Act and was liable to evicted from the suit premises, as envisaged by section 12 (3)(a) of the Rent Act. The Court further held that the standard rent was determined in the previous proceeding and the defendant was not entitled to raise dispute as regards the standard rent. Even if the amount of standard rent were open to challenge, the monthly rent of Rs. 16/= was the standard rent of the suit premises. Since the defendant had failed to avail of the protection conferred under section 12 of the Rent Act by remitting the arrears of rent due within one month from the date of the service of the suit notice or by raising dispute as regards the standard rent within one month of such date, the court proceeded to pass decree for possession and the amount of arrears of rent and costs. Feeling aggrieved, the defendant preferred above referred Regular Civil Appeal No.32 of 1977 in the District Court, Jamnagar. The learned Asstt. Judge, Jamnagar heard the appeal and dismissed the same on 29th January, 1980. Feeling aggrieved the defendant has preferred the present Revision Application.

Mr. Shah, the learned advocate for the petitioner has submitted that the suit for possession was filed essentially under section 12 (3)(a) of the Rent Act. The Court below has given a clear finding that the condition precedent to attract the provisions of section 12 (3)(a) of the Act were not satisfied and no decree for possession could have been passed under section 12 (3)(a) of the Act. The Court, thereafter, proceeded to examine the effect of section 12 (3)(b) of the Act and passed decree for possession under section 12 (3)(b) of the Act. This exactly is what is not permissible under the law. Once, the case was filed under section 12 (3)(a) of the Rent Act and the plaintiff failed to establish his case under the said provision, the Court could not have proceeded further to examine the effect of section 12 (3)(b) of the Act and to pass a decree thereunder. He has also submitted that the defendant had raised dispute as to the standard rent in the written statement Exh. 8 on 28th July, 1973. And therefore, unless and until the standard rent was fixed by the Court, there was no obligation to pay arrears of rent or the rent falling due

every month pending the trial. In the instant case, the standard rent was fixed by the trial court on the date of the decree. Even if there were some irregularities in depositing the rent pending trial, such irregularities shall not entail an order of eviction since the Court had not fixed the standard rent until the date of the decree. Once the trial Court had determined the standard rent, the defendant had made deposit of standard rent regularly. Thus, the defendant had established his readiness and willingness to pay the rent. The decree for possession passed by the Court, therefore, requires to be quashed and set-aside.

In support of his submissions, Mr. Shah has relied upon the judgment of the Hon'ble Supreme Court in the matter of N.M Engineer & Ors. v. Narendra Singh Virdi & Anr. [AIR (1995) SC 448]. Mr. Shah has submitted that the said judgment of the Hon'ble Supreme Court has been consistently followed by this Court in the matters of Pravinchand Savchand Shah v. Dhanumati Jayantilal Vazir [C.R.A No. 868 of 1981 decided on 24th January, 1995 : Coram :- M.S Parikh,J.]; of Somjibhai Popatbhai Kharwa v. Liladhar Ravjibhai Lohana {C.R.A No. 1023 of 1981 decided on 30th March, 1995 Coram :: S.D Dave, J.}; of Narbheram Ambalal & Ors. v. Jayantilal Dahyabhai Kharva [1998 (2) GLH 550]; of Amratlal Pandu Patel v. Vasantlal Motilal [1998 (2) GLH 571] of Kasambhai Ismailbhai through Heirs & Legal Representatives v. Bavabhai Karasanbhai Patel [1998 (2) GLH 606] and of Heirs of Jivraj Khimji-Laxmiben Jivraj Khimji v. Narandas Udhavdas & Ors. [2002 (2) GCD (24) NOJ Gujarat]. Mr. Shah has also relied upon the judgements of the Hon'ble Supreme Court in the matter of Vora Abbasbhai Alimahomed v. Haji Gulamnabi Haji Safibhai [5 GLR 55] and of this Court in the matter of Naranbhai Nathabhai Koli v. Modhia Panalal Maganlal [23 (2) GLR 98] and of Rupaben Wd/o. Kaththu Dhanji & Anr. vs. Babulbhai Deojibhai [24 (1) GLR 263].

The contentions raised by Mr. Shah are three-fold :- (a) the dispute as to the standard rent raised for the first time in the written statement is sufficient to take out the case from the purview of section 12 (3)(a) of the Rent Act; (b) unless and until the issue as regards the standard rent is determined by the Court, the defendant has no occasion to pay/tender the standard rent and permitted increase. Any default in payment of such rent or permitted increase, therefore, shall not entail decree for eviction; (c) in a case where the eviction is sought under section 12 (3)(a) of the Rent Act, if the plaintiff fails to make out a case under

section 12 (3)(a) of the Rent Act, the Court cannot proceed further to examine whether the case falls within the purview of section 12 (3)(b) of the Rent Act or to pass a decree for possession under the said section 12 (3)(b) of the Rent Act.

This Revision Application had come up for hearing before me on 2nd September, 2002. As the proposition made by Mr. Shah, supported by the judgment of the Hon'ble Supreme Court in the matter of N.M Engineer & Ors. vs. Narendra Singh Virdi & Anr. [AIR (1995) SC 448], did not appeal to me, in view of the above referred judgments of this Court, the issue -

> "[A] In a case for possession of the rented premises where the landlord fails to satisfy all the conditions mentioned in section 12 (3)(a) of the Rent Act, should the Court examine whether the tenant is entitled to protection under section 12 (3)(b) of the Rent Act. In a case where tenant is not found to be entitled to such protection, should the Court pass decree for possession."

was referred to the Larger Bench. The Larger Bench [Coram-M.S Shah & D.H Waghela, JJ.] by its judgment and order dated 6th April, 2005 answered the Reference as under:-

> "In so far as the landlord's right to claim eviction of the tenant from the rented premises on the ground of arrears of rent and permitted increases is concerned, the Rent Act does not provide for two different grounds of eviction as such, but provides for eviction on the ground of "non-payment of standard rent or permitted increases due". Failure to pay/tender the standard rent and permitted increases within the statutory period of one month from the date of service of notice under Section 12 (2) of the Act is a condition precedent for maintainability of a suit for eviction on the ground of "non-payment of standard rent or permitted increases due". The provisions of Section 12 (3)(a) and 12 (3)(b) do not provide for two mutually exclusive grounds of eviction. The conditions specified in Section 12 (3)(a) are cumulative. In a case for possession of the rented premises where any of

the conditions mentioned in Section 12 (3)(a) of the Rent Act is not satisfied, the Court has to examine whether the tenant is entitled to any protection under Section 12 (3)(b) of the Rent Act. Where the tenant is not found entitled to such protection, the Court may pass a decree or possession."

The above issue thus having been set to rest, I answer the other contentions as under :

So far as the dispute as to the standard rent is concerned, it is well settled that for taking the case out of the purview of section 12 (3)(a) of the Rent Act, (i) such dispute shall exist on the date of the suit notice; or (ii) the tenant shall raise such dispute within one month of receipt of the suit notice [as envisaged under sub-section 2 of section 12 of the Rent Act] either by giving reply to the suit notice and raising such dispute in such reply or by making an application to the Court as envisaged by explanation to Section 12 (3) of the Rent Act. Reference can be had to the judgments of this Court in the matters of Shah Ambalal Chhotalal v. Shah Babaldas Dahyabhai [3 GLR 625]; of Ramniklal Dwarkadas Modi v. Mohanlal Laxmichand & Ors. [18 GLR 32]; of Rafikbhai Husainbhai Chauhan vs. Soni Ghanshayambhai Popatlal [2001 (2) GLH UJ 3] and of the Hon'ble Supreme Court in the matter of Shah Dhansukhlal Chhaganlal vs. Dalichand Virchand Shroff (decd.) by his Legal Representatives [AIR 1968 SC 1109]. Relying on these judgments, I have, in the matter of the Edward Washing Company v. Bai Ammaben Suleman [Civil Revision Application No. 1670 of 1983 :: Decided on 5th September, 2002] held that the above referred judgments in the matters of Naranbhai Nathabhai Koli v. Modhia Panalal Maganlal [23 (2) GLR 98] and of Rupaben Wd./o Kaththu Dhanji & Anr. vs. Babubhai Deojibhai [24 (1) GLR 263] in so far as they lay down that a valid dispute as regards the standard rent can be raised by raising necessary plea in the written statement so as to attract the protection of section 12 (3)(b) of the Rent Act are per incuriam. Hence, in my view, in the present case, the defendant cannot be said to have raised dispute as regards the standard rent which would take the plaintiff's case out of the purview of section 12 (3)(a) of the Rent Act. Besides, as recorded hereinabove, the standard rent was determined in the previous suit and no bonafide dispute as to the standard rent could have been raised by the defendant in the present proceedings. It, therefore, cannot be said that on the date of the suit,

the dispute as regards the standard rent did exit.

There is one more aspect which requires to be examined to determine whether the plaintiff had succeeded in bringing his case within the purview of section 12 (3) (a) of the Rent Act or not i.e., whether the rent was payable every month or not. Indisputably, the standard rent determined in the previous suit was Rs.16/= per month inclusive of municipal tax and education cess. The learned trial Judge did hold that the rent being payable every month, the case fell within the purview of section 12 (3) (a) of the Rent Act. However, the lower appellate court appears to have taken a different view. The learned Judge has, relying upon the judgment in the matter of Dayalal Gangaram v. Bhimani Bhupatrai Chunilal & Anr. [18 GLR 349] held that since the defendant was liable to pay municipal tax and the education cess, the rent cannot be said to be payable by month. Hence, the provision contained in section 12 (3)(a) of the Rent Act were not attracted. I believe the lower appellate court has fallen in error in holding that the rent was not payable by month. Indisputably, the monthly rent payable includes the municipal tax and the education cess. The defendant was not required to pay any amount other than the monthly rent. In the case of Dayalal Gangaram [Supra], over and above the monthly rent, the tenant was required to pay education cess. The education cess being not payable by month, the Court held that the rent was not payable by month. Thus, the said judgment is not applicable on the facts of the present case. I am, therefore, of the opinion that the rent was payable by month. Further, the defendant was in arrears of rent for more than six months and that the defendant neglected to pay arrears of rent due within one month from the date of receipt of notice under sub-section (2) of section 12 of the Rent Act. Thus, there is no alternative but to hold that the plaintiff's case falls within the purview of section 12 (3) (a) of the Rent Act. Besides, it would not be out of place to mention here that the dispute of standard rent raised by the defendant in his written statement cannot be said to be genuine or bona fides. The same having been resolved in the previous suit. Further, the defendant by omitting to pay/tender rent regularly pending trial has forfeited right to protection under section 12 (3)(b) of the Rent Act, if any.

No other contention is raised before me. The Revision Application is dismissed with cost. Rule is discharged. Interim relief stands vacated.

[Miss R.M Doshit, J.]

Prakash*